Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KEITH DURR and D. ALAN HARRIS,

Petitioners,

v.

INTERCOUNTY TITLE COMPANY OF ILLINOIS, an Illinois Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether allegations that a title company secretly pocketed funds which it had collected as part of the *government* charges for recording services states a claim under RESPA § 2607(b).

Whether Rule 11 sanctions are appropriate with regard to a complaint's plausible damage claim, based on federal statutory provisions which have never been construed by any court.

Whether Rule 11 sanctions may be imposed by the Court of Appeals on account of alleged conduct which was not the subject of Rule 11 proceedings in the District Court.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners, Keith Durr and Alan Harris, and the respondent, Intercounty Title Company of Illinois, an Illinois Corporation ("ITC").

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Keith Durr and D. Alan Harris, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on January 20, 1994, which affirmed a final judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the court of appeals is reported at 14 F.3d 1183. The opinion of the district court is reported at 826 F. Supp. 259.

JURISDICTION

The opinion of the court of appeals was entered on January 20, 1994. A timely joint petition for rehearing, with suggestion for rehearing *en banc* was denied on February 16, 1994. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 2601

RESPA § 2601:

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. . . .

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—

> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.

12 U.S.C. § 2602(3)

RESPA § 2602(3):

(3) the term "settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of

credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, and the handling of the processing, and closing or settlement.

12 U.S.C. § 2603(a)

RESPA § 2603(a):

(a) The Secretary [of Housing and Urban Development] . . . shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variation as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller . . . .

12 U.S.C. § 2607(a)

RESPA § 2607(a):

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(b)

RESPA § 2607(b):

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(d)(3)

RESPA § 2607(d)(3):

Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally

liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

12 U.S.C. § 2614

RESPA § 2614:

Any action pursuant to the provisions of section 2607 or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within one year from the date of the occurrence of the violation, ...

Fed. R. Civ. P., Rule 11,
***amended* Apr. 22, 1993, eff. Dec. 1, 1993**

Rule 11 of the Federal Rules of Civil Procedure

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601 et seq. ("RESPA"),[1] is important consumer protection legislation, designed to safeguard homeowners from misconduct perpetrated by overreaching title companies.

Petitioner, Keith Durr ("Durr"), bought a house in a Chicago suburb on August 21, 1992, using a federally related home mortgage. Respondent, Intercounty Title Company of Illinois ("ITC"), provided the closing settlement services for Durr's new home.

While the county government fee for recording Durr's deed was only $23, ITC charged him $25 for "Government Recording Services" in connection with the deed. ITC kept the additional $2 for itself without disclosing this fact on Durr's RESPA Closing Statement. ITC also recorded Durr's mortgage. ITC itemized an excessive $37 charge for this "Government Recording Service", while the county recorder only charged ITC $31.50. ITC pocketed the additional $5.50, again without disclosing this fact on Durr's RESPA Closing Statement. In short, ITC secretly diverted to itself a total of $7.50 for services it did not perform. In the same transaction, ITC charged Durr for other settlement services: $155 for closing fees (including preparation of the RESPA closing statement) and $170 for title insurance.

On November 5, 1992, counsel filed a Class Action Complaint. Counsel charged a violation of RESPA, alleging, in pertinent part, as follows:

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[1] RESPA comprises 12 U.S.C. §§ 2601-2617. All statutory citations in this Petition will take the form "RESPA § ____," citing to the section numbering within Title 12 rather than RESPA's internal section numbering.

5. . . . A true and correct copy of the Settlement Statement is attached to the Complaint as Exhibit A. Exhibit A to the Complaint is a 'uniform settlement statement' as defined by 12 U.S.C. § 2603. . . .

6. In connection with the transaction, defendant charged Keith Durr $25.00 to record the Deed and $37.00 to record the Mortgage. . . .

7. In fact, the true recording cost for the Deed was $23.00, and defendant exacted an illegal, additional $2.00 payment for recording the Deed. . . .

8. In fact, the true recording cost for the Mortgage was $31.50, and defendant exacted an illegal, additional $5.50 payment for recording the Mortgage. . . .

. . .

11. By charging the plaintiff $25.00 rather than the actual $23.00 cost for recording of the Deed, the defendant violated 12 U.S.C. § 2607(b) by accepting a charge for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12. By charging the plaintiff $37.00 rather than the actual $31.50 cost for recording of the Deed, the defendant violated 12 U.S.C. § 2607(b) by accepting a charge for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

. . .

Wherefore, plaintiff requests judgment as follows:

1. For an Order requiring defendant to pay to plaintiff and the class members their statutory damages, three times the amount of any charge paid for such settlement services: the monies which defendant collected from the plaintiff and the class members in connection with the transactions at issue, including without limitation the Recording Fees (for Mr. Durr,

$62.00); the Closing Fees (for Mr. Durr, $155.00); and the Title Insurance (for Mr. Durr, $170.00).

The district court struck the prayer for relief and dismissed the action for failure to state a claim under RESPA § 2607(b). *Durr v. Intercounty Title Co. of Illinois*, 826 F. Supp. 259, 260-263 (N.D. Ill. 1993). The district court imposed sanctions under Fed. R. Civ. P. ("Rule") 11,[2] based on the prayer for relief in the First Amended Complaint, finding that it did not present "a plausible view of the law." *Durr v. Intercounty Title Co. of Illinois*, No. 92 C 7340, slip op., p. 2, n. 1 (N.D. Ill., March 18, 1993) (Reproduced in Appendix).

Durr and Harris appealed the dismissal of the RESPA claim and the imposition of sanctions to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). The Seventh Circuit affirmed the district court rulings. *Durr v. Intercounty Title Co. of Illinois*, 14 F.3d 1183 (7th Cir. 1994), *reh'g denied*. The Seventh Circuit, without citation of any precedent, found that there was no basis for the damage claim. *Id.* at 1188. Additionally, the Seventh Circuit incorrectly upheld "the district court's decision to impose sanctions because Harris sued on behalf of a class of plaintiffs that did not exist." *Id.* at 1188. The district court never made any such ruling. Furthermore, the uncontradicted record reflects that plaintiff conducted an elaborate prefiling investigation, and that the class consists of tens of thousands of persons.

ITC's improper bill for Government Recording and Transfer Charges was part of a widespread pattern of miscon-

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[2] These sanctions were brought under the former Rule 11. However, the changes embraced by the current Rule, effective as of December 1, 1993, do not impact the issues addressed in this Petition.

duct. Counsel testified regarding the prefiling investigation:

> Q So have you ever seen an instance in which there was a disparity in the amount of the charge, other than in the Durr case?
>
> A Well, after looking into the Durr situation, I started looking into some other files and found that it happened in just about every file.
>
> Q How much were they off on every file?
>
> A Two, three dollars a document, two dollars a document.
>
> Q Was it sometimes high and sometimes low?
>
> A Depends on the document. The deed was usually $2 more, the mortgage was sometimes $5 more, $6 more.

Forrest Deposition at p. 43.

> Q So you looked through a thousand files, and your best recollection is that in addition to Mr. Durr, you thought you found perhaps 20 others?
>
> A No, I said I looked through some Intercounty files where I wouldn't—they go back three or four years ago. I looked through Chicago Title & Trust Company files. I looked through Ticor files. I looked through Attorneys' National files, Attorneys' Title files ad infinitum. I wanted to see—through Republic Title. There were six or seven different title companies whose files I checked, and in no instance did I find that they had charged $2 or a dollar-fifty more than the actual recording.
>
> Q So you found no other instance of that other than in connection with Intercounty?
>
> A Yes, that's correct.

Forrest Deposition at p. 49.

According to the uncontradicted evidence below, prior to the filing of this suit, plaintiff's counsel determined that other title insurance companies in the Chicago market simply billed their customers for the actual Government Recording and Transfer Charge, paying all of the funds to the appropriate county recorder when filing the pertinent documents. Counsel concluded that the purpose and effect of ITC's practice of padding the Government Recording and Transfer Charge was to make the defendant's charge for the separately itemized matters, Title Insurance and Closing Fees, appear relatively lower than those of its competitors. Accordingly, the entire amount of the Title Insurance and Closing Fees was "involved" in the RESPA violation, for the defendant's obvious motive in artificially inflating the Government Recording and Transfer Charge was to make its charges for Title Insurance and Closing Fees appear more competitive.

STATEMENT OF FEDERAL JURISDICTION BELOW

The district court's jurisdiction was predicated on the existence of a federal question. The federal statutes involved are the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601 et seq. ("RESPA") and F. R. Civ. P. Rule 11.

The United States Court of Appeals for the Seventh Circuit had jurisdiction by reason of 28 U.S.C. § 1291. The orders sought to be reviewed by the Seventh Circuit were entered on February 5, 1993 and March 18, 1993. No motion was filed which might toll the time within which to appeal. The Notice of Appeal was filed on the 10th day of June, 1993.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to prevent judicial repeal of RESPA § 2607(b) and to resolve an important conflict between the Seventh Circuit and other circuits in the interpretation and application of Rule 11.

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION BECAUSE IT VITIATES CONSUMER PROTECTION LEGISLATION.

ITC violated the provisions of RESPA, specifically, RESPA § 2607(b). The Seventh Circuit held that "Intercounty's overcharge was simply a windfall it kept for itself." *Durr v. Intercounty Title Co. of Illinois*, 14 F.3d 1183, 1187 (7th Cir. 1994). By narrowly reading the statute at issue, the Seventh Circuit ignores this Court's decisions regarding statutory construction and deprives consumers of the RESPA's intended protection. This Court should act to prevent judicial repeal of this remedial legislation.

A. Section 2607(b) Of RESPA Prohibits Retention Of Fees Other Than For Services Actually Performed.

Section 2607(b) of RESPA prohibits retention of fees other than for services actually performed. Defendant's acceptance of a portion of the sums which it levied against Mr. Durr for Government Recording and Transfer Charges violates RESPA § 2607(b). Under the statute:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

RESPA § 2607(b). The plain language of the statute prohibits the acceptance of a portion of a charge made for the rendering of a real estate settlement service "other than for services actually performed." RESPA § 2607(b) does not require a "kickback" or two culpable parties. The district court dismissal should be reversed, with this case remanded for further proceedings.

In *Mercado v. Calumet Federal Sav. & Loan Ass'n.*, 763 F.2d 269 (7th Cir. 1985), the Seventh Circuit, construing *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) (en banc), stated that a RESPA violation would occur in "an arrangement under which a participant in the settlement process extracted more than a statutorily-prescribed fee, remitted the appropriate fee to the County, and kept the rest for himself." 763 F.2d at 271. That is precisely what occurred here, where ITC: (1) extracted a $25 fee for recording a deed, remitted the statutorily required $23 to the County, and kept the $2 balance for itself; and (2) extracted a $37 fee for recording a mortgage, remitted the statutorily required $31.50 to the County, and kept the $5.50 balance for itself. ITC's acceptance of unearned fees, disguised as funds collected for the County Recorder, violates RESPA.

B. RESPA Should Be Construed Broadly.

RESPA is a remedial statute which is to receive liberal construction to effectuate its purposes. In *Tcherepnin v. Knight*, 389 U.S. 332 (1967), the United States Supreme Court gave liberal construction to the Securities Exchange Act of 1934:

> In addition, we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the

> category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities . . .

389 U.S. at 336. Here, RESPA is intended to protect the public through a requirement of full disclosure. RESPA § 2601. It is remedial legislation which should be construed in broad fashion. Treble damage statutes such as RESPA are "highly remedial," and "should be liberally construed to effect the purpose of Congress and to give a remedy in all cases intended to be covered." *Adler v. Northern Hotel Co.*, 175 F.2d 619, 621 (7th Cir. 1949).

"In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Here, by placing a narrow, restrictive construction upon RESPA § 2607(b), by imposing a "kickback" requirement involving two distinct persons, the Seventh Circuit vitiates § 2607(b). If RESPA § 2607(b) is read to require a "kickback," it does not significantly differ from § 2607(a). In statutory construction, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1980). Congress intended RESPA to provide relief from title companies which seek to pocket unearned fees, thereby increasing closing costs.

C. RESPA's Legislative History.

The legislative history supports the *Mercado* conclusion that the statute prohibits "an arrangement under which a participant in the settlement process extracted more than a statutorily-prescribed fee, remitted the appropriate fee to the County, and kept the rest for himself." 763 F.2d at 271. In addition, the legislative history supports plaintiff's interpretation that the statute is aimed at un-

earned fees as well as kickbacks. According to a "section-by-section summary" of the law:

> Section 7. Prohibition against Kickbacks and Unearned Fees.
>
> . . .
>
> Subsection (a) of this section prohibits any person from giving or receiving any fee, kickback or thing of value pursuant to any agreement that business incident to a real estate settlement involving a federally-related mortgage loan shall be referred to any person.
>
> Subsection (b) prohibits the acceptance of any portion of any charge for the rendering of a real estate settlement service other than for services actually rendered.

S. Rep. 93-866, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6554, 6556. The analysis of section (b) contains no reference to a requirement for "kickbacks." A "kickback" is required only for violation of section (a). The two sections address separate evils: (a) kickbacks and (b) unearned fees.

When the legislation was introduced in the Senate, its sponsor caused the following "section by section" analysis to be included in the legislative history:

> Prohibition Against Kickbacks and Unearned Fees
>
> Section 7 is identical to section 105 of S. 2228 and would prohibit the payment or receipt of any kickback or referral fee made for the referral of real estate settlement business. *In addition*, this section would prohibit any person from giving *or* accepting any portion of any charge made for the rendering of a settlement service unless the payment were made for services actually performed. Both civil and criminal penalties would be imposed for violation of the prohibitions.

120 Cong. Rec. 6587 (1974) (emphasis added). This portion of the legislative history contains no indication that a "kickback" is required to find a violation of section (b). The legislative intent is stated: a violation occurs from "giving *or* accepting any portion of any charge" other than for services actually performed. *Id.*

There is no dispute but that the defendant has taken an unearned "portion" of the "Government Recording and Transfer Charge." Under the circumstances, this Court should not give title companies a green light to pocket unearned fees which they might collect on account of alleged "Government Recording and Transfer Charges."

D. Under *Gannon*, A Single Party May Violate RESPA Section 2607(b).

A single party may violate RESPA § 2607(b). In *Gannon*, a counter attendant at Cook County's title registration office violated RESPA when he accepted payments for filings which were greater than that which was authorized by state law. It was held that "a single individual *can* violate 2607(b) by receiving in his official capacity a 'charge' for the rendering of settlement services, but personally keeping a portion of the charge in fact for something other than the performance of those services." *Gannon*, 670 F.2d at 438 (emphasis in original). *Gannon* has been construed as permitting the court to find a single entity may "kickback" fees to itself: "Thus, the two parties were the individual in his official capacity and the individual in his personal capacity (i.e., 'kicking-back' to himself)." *Duggan v. Independent Mortgage Corp.*, 670 F. Supp. 652 (E.D. Va. 1987) (construing *Gannon* and *Mercado*). Here, ITC acted in its official capacity as a fiduciary, closing the transaction, and in a secret, corporate capacity, kicking-back fees which, in the ITC-pre-

pared RESPA Closing Statement, it had falsely represented would be paid to the County. *Gannon* construes the statute to apply in a criminal case: surely a similarly broad interpretation should be placed on the statute in this civil, consumer protection case.

Any requirement that "two parties . . . share fees" is met in this case. *Mercado v. Calumet Fed. Sav. & Loan Ass'n.*, 763 F.2d 269, 270-71 (7th Cir. 1985). The Seventh Circuit decision below misconstrued the pleadings by failing to recognize the substance of the complaint: that ITC split the Government Recording and Transfer Charge with the county recorder. The Seventh Circuit held that:

> In this case, as in Mercado, the plaintiff failed to allege that Intercounty's overcharge was in the nature of a 'portion, split, or percentage of any charge' given to a third party. If anything, Intercounty's overcharge was simply a *windfall* it kept for itself. As we stated in *Mercado*, RESPA 'requires at least two parties to share fees.' *Id.* at 270. Therefore, the district court correctly dismissed this case because there was no allegation that Intercounty share the $8.00 with anyone.

Durr, 14 F.3d at 1187 (emphasis added). In fact, however, the complaint specifically alleged that ITC collected a total of $62.00 for Government Recording and Transfer Charges when the county recorder required only $54.50 to record the deed and mortgage. Accordingly, there was a split of the $62.00, with ITC keeping $7.50 while giving $54.50 to the county recorder.

Here, unlike *Mercado*, there is an allegation that two parties split the fee for Government Recording and Transfer Charges. The Government Recording and Transfer Charge was shared between ITC and the County. Here, ITC has received, and still retains, a self-created *windfall* payment for "Government Recording and Transfer

Charges." In fact, the county's statutory charge is less than that which ITC collected at the closing, pursuant to the RESPA Closing Statement which it had prepared.

It is true that the County was only paid for services actually performed, but nothing in the plain language of the statute or the case law requires that *both* parties involved in the sharing of fees fail to perform services. *Mercado* found that in *Gannon*, "[t]he attendant's acts met the common definition of a split; he took part of a payment for himself and passed on the rest." 763 F.2d at 271. The same occurred here: ITC took part of the payment for Government Recording and Transfer Charges and passed on the rest. When the appellee charges all its customers a "service and handling fee" of $1.50 for recording documents with county recorders, and disguises that charge as a "Government Recording and Transfer Charge" in the RESPA Closing Statement, its actions are virtually identical to those in *Gannon*. The decision below should be reversed, and this matter remanded for resolution on the merits.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH *COOTER & GELL v. HARTMARX CORP.*

The decision below is in direct conflict with *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), in which this Court held that Rule 11 sanctions are appropriate only when a filing is legally untenable, baseless, unreasonable and implausible or unreasonable under the circumstances. *Cooter & Gell*, 496 U.S. at 393 and 405; *Business Guides v. Chromatic Comm.*, 498 U.S. 533, 551 (1991). This Court has limited the term "frivolous" to matters which lack an arguable basis in the law. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), citing *Anders v. California*, 386 U.S.

738, 744 (1967). Here, the damage claim is consistent with the statute. No earlier case has construed the damage provisions of the statute. The class action issue was not the basis for sanctions in the district court. Accordingly, the allegations in the complaint were not frivolous and counsel should not have been sanctioned.

A. The Damage Issue.

Sanctions should not have been awarded on account of plaintiff's prayer for relief. The Seventh Circuit reasoned that sanctions were appropriate since "[t]here was never an allegation that these fees [the $62.00 for recording fees, $155.00 for closing fees, and $170.00 for title insurance] were illegitimate." *Durr*, 14 F.3d at 1188. However, the damage section of the statute only requires that the amounts be "involved" in the violation, not that the amounts be "illegitimate". The statute provides:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service *involved* in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

RESPA § 2607(d)(3) (emphasis added). The antecedent to "such settlement service" is "the settlement service involved in the violation."

The Seventh Circuit held that counsel had no basis for nor an answer to the district court's inquiry as to the class action and damage issues. *Durr*, 14 F.3d at 1188. This conclusion is incorrect, for counsel gave a full explanation in a memorandum submitted after the district court's *sua sponte* review of the complaint. *Id.* at 1185. Counsel argued that ITC imposed hidden charges for document handling, thereby making its charges for Title

Insurance and Closing Fees appear more reasonable in comparison to competitors' charges for these services. ITC's conduct was motivated by its desire to expand its market share for its Title Insurance and residential real estate Closing business. The charges associated with these services are "involved in the violation."

Sanctions should not be imposed in cases of first impression. By imposing sanctions in cases involving issues of first impression, the Seventh Circuit is in conflict with the law of other circuits. A circuit by circuit analysis reveals that other circuits do not freely impose sanctions when confronted with an issue of first impression. The First Circuit has held that where the law is not settled, sanctions should not be imposed. *Fudge v. Penthouse Intern., Ltd.*, 840 F.2d 1012, 1022 (1st Cir. 1988). The Second Circuit has held that an attorney "need not accurately prognosticate the law in order to avoid sanctions." *Securities Industry Ass'n v. Clarke*, 898 F.2d 318, 321-322 (2nd Cir. 1990). The Third Circuit has specifically ruled that "advocating new or novel legal theories" does not trigger a sanction award, *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3rd Cir. 1987), even when unsuccessful. *Teamsters Local Union No. 430 v. Cement Exp., Inc.*, 841 F.2d 66, 70 (3rd Cir. 1988). The Fourth Circuit held that no sanctions should be imposed when case law on the issue is non-existent in the circuit or from the Supreme Court. *Brubaker v. City of Richmond*, 943 F.2d 1363, 1378 (4th Cir. 1991).

The Fifth Circuit holds that Rule 11 sanctions should not be imposed "for advocacy of a plausible legal theory, particularly where, as here, the law is arguably unclear." *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 794 (5th Cir. 1993). Such reasoning follows the Fifth Circuit's earlier opinions that "[p]arties who argue points of

first impression in a circuit are not ordinarily the recipients of a Rule 11 sanction order" and Rule 11 is not meant to be an absolute guarantee of the correctness of the theory of law. *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993) (citations omitted), and *Smith Intern., Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1199 (5th Cir. 1988). The Sixth Circuit also examines the clarity of the law and will not sanction claims involving uncertain law. *McGhee v. Sanilac County*, 934 F.2d 89, 94 (6th Cir. 1991).

Similarly, the Eighth, Ninth and Eleventh Circuits have expressed that sanctions should be withheld on interpretation of new issues. In *O'Connell v. Champion Intern. Corp.*, 812 F.2d 393, 394 (8th Cir. 1987), the Eighth Circuit indicated that plaintiffs are entitled to argue points considered meritless by the court when the circuit has not previously ruled on the issue. The Ninth Circuit, in a series of opinions, has ruled that questions of first impression or unclear law should not be a basis for sanctions. In *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987), the court held that a good faith argument on what the law is or should be is not sanctionable conduct. *Id.* at 1583. Later, the Ninth Circuit rejected sanctions when the plaintiff's argument had logical appeal and was on an issue previously undecided in the circuit. *In Re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992). Other opinions have followed this same logic. See *Unigard Sec. Ins. v. Lakewood Engineering & Mfg.*, 982 F.2d 363, 370 (9th Cir. 1992); *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994). Finally, the Eleventh Circuit held that Rule 11 is not intended to "deter novel legal arguments or cases of first impression." *Local 938 Joint H. & W. Tr. F. v. B.R. Starnes Co.*, 827 F.2d 1454, 1458 (11th Cir. 1987).

Under the standards enunciated by these circuits,[3] counsel's conduct in filing the Complaint may not be sanctioned. The Seventh Circuit decision should be reversed.

Commentaries to Rule 11 support the proposition that issues of first impression, as in the present case, should not be sanctioned. *Moore's* finds sanctions inappropriate when interpretations of the law differ, contrary controlling authority is not obvious or the challenged position is supported by good faith argument for extending, modifying or reversing existing law. 2A *Moore's Federal Practice* ¶ 11.02[3.-1] [1993] (citations omitted). Wright & Miller argue that sanctions are not likely to be imposed on a "matter of first impression, even if there is contrary authority in other courts, or when the law is not clear." Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 1335 [1992] (citations omitted).

Further support is found in various other publications. One commentator, in reviewing Rule 11 decisions, found that courts are more tolerant of novel legal theories or stretching some arguably relevant legal theory, "especially in cases of first impression, and cases involving unsettled" areas of law. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 214-215. See generally Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* § 6.05[a][1] (2nd ed. & Supp. 1993). Another commentator noted that arguments involving unsettled areas of the law are rarely sanctioned due to the law's constant evolution, even in areas that appear well settled. Joseph, *Sanctions:*

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[3] For a recent District of Columbia district court decision regarding Rule 11 sanctions, see *Kerner v. Cult Awareness Network, Washington, D.C.*, 843 F.Supp. 748, 750 (D.D.C. 1994) ("Parties legitimately pressing the courts to answer open questions in the law should not be subject to Rule 11 sanctions").

The Federal Law of Litigation Abuse §12(B)(3) (2nd ed. 1994). The damage theory was a relevant argument on an unknown area of the law and should not have been sanctioned.

Sanctioning good-faith arguments on issues of first impression chills zealous advocacy. In upholding sanctions, the Seventh Circuit failed to weigh the competing concern of Rule 11: the Rule "*must* be read in light of concerns that it will . . . chill vigorous advocacy." *Cooter & Gell*, 496 U.S. at 374. (emphasis added). See also *Securities Industry Ass'n*, 898 F.2d at 322; *Gaiardo*, 835 F.2d at 482-483, 485; *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 556 (3rd Cir. 1989); *Brubaker*, 943 F.2d at 1378; *CJC Holdings, Inc.*, 989 F.2d at 794; *Davis v. Crush*, 862 F.2d 84, 89 (6th Cir. 1988); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159-1160 (9th Cir. 1987); citations based on Adv. Com. Notes (1983) to Fed. R. Civ. P. 11.

The Seventh Circuit opinion in this case will stifle legitimate advocacy, remove incentive to advance difficult cases, lead attorneys to "play it safe" and deter advance or change in the law. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1338-1343. Here, counsel's legitimate attempt to determine the extent of the statutory scheme is the very type of advocacy which must be vigorously protected from the improper imposition of Rule 11 sanctions.

B. The Class Action Issue.

The Seventh Circuit incorrectly held that counsel was sanctioned for asserting a class action when a class did not exist. *Durr*, 14 F.3d at 1188. The Seventh Circuit con-

clusion that counsel "sought recovery for" a "phantom class of injured plaintiffs" is simply incorrect. *Id.* at 1186. In "upholding" Rule 11 sanctions against counsel for alleged misconduct that was not the subject of the district court decision, the Seventh Circuit decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The record demonstrates counsel conducted an appropriate investigation of the facts establishing the class and that a large class exists.

After submission of counsel's response to the court's *sua sponte* review, the district court did not impose sanctions on account of an alleged phantom class. Before sanctioning counsel, the district court ordered a briefing schedule on the Rule 11 issue. *Durr*, 826 F. Supp. at 263. Only after the briefing did the district court enter a sanctions order. The court's imposition of sanctions does not indicate that the class action played any part in its ruling. *Durr v. Intercounty Title Co. of Illinois*, No. 92 C 7340, slip op. (N.D. Ill., March 18, 1993) (Reproduced in Appendix). Instead, the court held that the litigation was driven by an improper damage claim. *Id.*, p. 1.

In dismissing the cause of action and striking the damage claim, the district court found the theory of damages to be frivolous. *Durr*, 826 F. Supp. at 261. In so doing, the court indicated that Rule 11 sanctions would be appropriate if Harris could not set forth an objective good faith basis for his damage claim. *Id.* Thus, the court imposed sanctions based on the damage issue. It is true that in two earlier opinions, the district court questioned the propriety of a class action. *Durr*, 826 F. Supp. 264-266. However, the court made no finding that the class was improper or that sanctions should be imposed on account of it.

Counsel outlined the prefiling investigation in the initial memorandum to the district court. Counsel had reviewed numerous Settlement Statements prepared by ITC, all of which indicated that ITC improperly overcharged for the "Government Recording and Transfer Charge." Counsel reviewed numerous Settlement Statements prepared by other title insurance companies, finding these to only include charges actually levied by the county government involved. Counsel reviewed ITC's Schedule of Fees and Services which revealed that ITC had eleven closing offices in Cook County, alone. Accordingly, counsel concluded that the proposed class included thousands of persons who had been overcharged under the illegal scheme to retain a portion of the funds earmarked for payment to the county recorder. Sanctions should not have been imposed.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1570 & 93-2433

KEITH DURR,

Plaintiff-Appellant,

v.

INTERCOUNTY TITLE COMPANY OF ILLINOIS,
an Illinois corporation,

Defendant-Appellee.

Appeal of:
D. ALAN HARRIS,

Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 7340—**Milton I. Shadur**, *Judge.*

ARGUED OCTOBER 25, 1993—DECIDED JANUARY 20, 1994

Before POSNER, *Chief Judge*, MANION, *Circuit Judge*, and GRANT, *District Judge.**

MANION, *Circuit Judge.* Attorney Alan Harris filed suit against Intercounty Title Company of Illinois, a title re-

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* Hon. Robert A. Grant, District Judge for the Northern District of Indiana, is sitting by designation.

cording company, for overcharging Keith Durr $8.00 for the recording of a deed and mortgage. Durr purported to represent a class of consumers who also were allegedly overcharged, and who claimed damages three times the amount each class member paid Intercounty. The district court dismissed the complaint, and imposed Rule 11 sanctions for the attorney's unsubstantiated assertion that a class existed, and for the grossly inflated damage claim. The district court noted that the complaint, though cloaked "in the knightly mantle of consumer protection" was actually an attempt to turn a "petty dispute into a big-ticket lawsuit." Durr appeals the district court's dismissal of the lawsuit. Attorney Harris appeals the district court's imposition of sanctions. We affirm the dismissal and sanctions.

I. Facts

On August 21, 1992, Keith Durr purchased a house in Indian Park, Illinois, using a federally related mortgage loan. He enlisted Intercounty Title Company to perform a number of services associated with the purchase. Among other services it provided, Intercounty filed the deed and mortgage with the Cook County Recorder of Deeds, which charged $23.00 to record the deed, and $31.50 to record the mortgage. When Intercounty billed Durr, it charged $25.00 and $37.00 respectively as reimbursement for the fees it paid to Cook County, with the proviso that "we have included a $1.50 service and handling fee in the charges for any instruments recorded." Therefore, Intercounty overcharged Durr, at most, approximately $8.00.[1] Intercounty also billed Durr for other services it provided, including $62.00 for recording fees, $155.00 for closing fees, and $170.00 for title insurance.

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[1] Even though the actual overcharge was, at most, really $7.50, we have rounded up to give Harris the benefit of any doubt, and to maintain consistency with the district court's decisions, which always referred to an $8.00 overcharge.

The attorney who represented Durr in the closing on the house discovered the discrepancy between the amount Cook County charged to record the deed and mortgage, and the amount Intercounty charged Durr to reimburse this cost. That attorney never contacted Intercounty about this discrepancy. Instead, he contacted attorney D. Alan Harris, who filed a class action lawsuit against Intercounty. In the initial complaint, Harris alleged that Intercounty violated the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2607(b), by overcharging real estate sellers and buyers in "transactions involving federally related mortgage loans." The complaint identified only one specific overcharge—Intercounty's charge to Durr of $25.00 and $37.00 instead of the actual $23.00 and $31.50 for Cook County's title and mortgage recording fees. Harris alleged, nevertheless, that Intercounty overcharged other real estate sellers and buyers; Harris filed the complaint as a class action on behalf of all of them. In his prayer for relief, Harris requested not only the $8.00 which Intercounty overcharged Durr, but also full recovery of the fees Intercounty regularly charged, including $62.00 for Durr's recording fees, $155.00 for his closing fees, and $170.00 for his title insurance. Harris then asked the court to treble the entire damage amount.

Intercounty responded to the complaint by writing a letter to the district court explaining that the $8.00 overcharge was due in part to oversight, and in part to copying costs and mailing costs. By its calculations, Intercounty actually overcharged Durr only $4.50. Intercounty also informed the court that Durr never as much as made a phone call to clear up the discrepancy. The district court *sua sponte* issued a memorandum order, which criticized the complaint's excessive damage claim, and apparent lack of factual support for the existence of other injured plaintiffs. The court expressed these concerns as follows:

> At the outset some points ought to be made about Durr's own claim. Even if Durr's allegations are to be accepted (as this Court is bound to do in evaluating his complaint), Durr's damages for the violation

> would appear to be three times the $8.00 overcharge or $24.00, rather than three times what Intercounty charged for all its settlement services as prayed for in Durr's complaint (Durr was charged $62 for the recording fees referred to earlier, plus $155 for closing fees (which he does not challenge as a RESPA violation), and plus $170 for title insurance (also a non-challenged item)).
>
> * * *
>
> So much then for Durr's own apparently overblown individual claim. As for any effort to springboard that individual claim into a class action (something that this Court is obligated to address early under Rule 23(c)(1)), there is nothing to suggest that the complained-of overcharge is part of a regular pattern of activity engaged in by Intercounty. Instead complaint ¶ 3 simply refers to "all other persons who have been improperly overcharged for settlement services by the defendant in connection with transactions involving a 'federally related mortgage loan.' " Durr's lawyers have proffered nothing to indicate that such a conclusory allegation—something that if sought to be introduced in the course of litigation would be subject to be stricken as "assuming facts not in evidence"—is the product of the prefiling inquiry that counsel are mandated to undertake by Rule 11.

The court ordered Harris to respond to these issues within ten days.

Although warned of the frivolity of his damage request, and the apparent lack of foundation supporting the existence of his professed class, Harris persisted in his attack. Within the ten-day deadline imposed by the court, Harris filed a nine-page memorandum attempting to elucidate his legal theories. He also filed an amended complaint which boldly reasserted the errors of the first complaint; Harris maintained the identical damage request, and sought recovery for the same phantom class of injured plaintiffs. The court then *sua sponte* issued a second memorandum,

again identifying the defects in the pleading. Harris also ignored this warning.

Having fired two warning shots, the district court proceeded to consider the complaint as it would any other, under the strictures of the applicable law and the Federal Rules of Civil Procedure. Intercounty filed a motion to dismiss the amended complaint, and a motion to strike the prayer for relief. The court responded by dismissing the complaint, concluding that even if its allegations were accepted as true, the complaint did not state a claim under RESPA. This ruling, of course, had the effect of striking the prayer for relief. But the court chose to consider Intercounty's motion to strike the prayer for relief in the context of Rule 11, Fed.R.Civ.P. The court reiterated its criticism of the excessive damage claim, and the lack of foundation for the existence of the class of injured plaintiffs. The court initiated the Rule 11 proceedings as follows:

> There is no question but that the dollar signs here were in Harris' eyes, and they obviously blinded him to the plain meaning of the law. Accordingly the complaint's prayer for relief must be stricken. And Harris' greed and obduracy must have their price. Unless Harris can offer up some better showing of the objective good faith that is demanded by Fed.R.Civ.P. ("Rule") 11 than he has done up to now, he will be subject to an "appropriate sanction" as mandated by that rule.

The parties filed memoranda regarding Rule 11. Intercounty created a side issue in the Rule 11 proceedings by stating in its memorandum that "Mr. Harris has made somewhat of a career of being a legal gadfly, and shows a marked propensity for persisting with meritless claims." Intercounty proceeded to recount an instance where another court sanctioned Harris for pursuing a meritless claim. Harris responded immediately to these accusations by filing a motion to strike Intercounty's statements because they were inaccurate. The court then held a hearing to resolve the Rule 11 question. The court granted

Harris' motion to strike, finding Intercounty's accusations about Harris' reputation to be inappropriate. The court then proceeded to impose $8,000 in Rule 11 sanctions against Harris, plus taxable costs. Durr appeals the dismissal of his RESPA claim, and Harris appeals the imposition of Rule 11 sanctions.

II. Analysis

A. Motion to Dismiss

The theory of recovery which Harris presents in the complaint begins with the Real Estate Settlement Procedures Act—RESPA. To understand Harris' theory, and its ultimate impropriety, it is necessary to first discuss that statute. At its core, "RESPA is an anti-kickback statute." *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270-71 (7th Cir. 1985). Its purpose is to "prohibit all kickback and referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." *Id.* (quoting Senate Report). In line with this broad purpose, the specific RESPA section which Harris relied upon in framing the complaint, 12 U.S.C. § 2607(b), provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." RESPA goes on to provide treble damages for parties injured by violations of the statute. 12 U.S.C. § 2607(d)(2).

When Harris became aware that Intercounty had overcharged Durr for mortgage and deed recording services, he apparently concluded that this action violated the statute. He also supposed—without conducting any factual inquiry—that Intercounty's overcharge to Durr was not an isolated incident; he surmised that if Intercounty overcharged Durr, it must have overcharged others. Harris proceeded to draft and file a class action complaint, on behalf of all those unknown plaintiffs injured by Inter-

county's overcharging. Durr was named as the representative of the class.

Ultimately the district court dismissed the complaint, concluding that it did not state a claim under RESPA. Durr appeals that ruling. Although this appeal primarily challenges sanctions, we first need to examine the propriety of the district court's dismissal of the complaint. We review the district court's decision to dismiss *de novo*. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992). In conducting our review, we accept all material allegations made in the complaint as true, and draw all reasonable inferences from these allegations in the plaintiff's favor. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992). We will affirm the court's dismissal if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The principal fact alleged in the complaint is that Intercounty overcharged Durr, in the amount of $8.00, for mortgage and deed recording services. Harris based his entire RESPA class action on this lone overcharge. The district court determined that this single fact was not enough to state a claim under RESPA, and we agree. Our decision in *Mercado* supports the district court's dismissal in this case. In *Mercado*, the plaintiff alleged that a bank violated RESPA by wrongly declaring a mortgage to be in default, and then demanding immediate payment or refinancing at terms favorable to the bank. The plaintiff claimed that the favorable refinancing would provide the bank an undeserved windfall, which essentially amounted to the type of overcharging in a real estate transaction which RESPA was intended to prohibit. We conceded that "RESPA is a broad statute, directed against many things that increase the cost of real estate transactions." *Mercado*, 763 F.2d at 271. But we concluded that, under RESPA's express terms, this broad protection extends only over transactions where the defendant gave or received "any portion, split, or percentage of any charge" to a third party. *Id.* at 270. We held that because the complaint did

not allege any such kickback to a third person, the plaintiff failed to state a claim under RESPA.

In this case, as in *Mercado*, the plaintiff failed to allege that Intercounty's overcharge was in the nature of a "portion, split, or percentage of any charge" given to a third party. If anything, Intercounty's overcharge was simply a windfall it kept for itself. As we stated in *Mercado*, RESPA "requires at least two parties to share fees." *Id.* at 270. Therefore, the district court correctly dismissed this case because there was no allegation that Intercounty shared the $8.00 with anyone.

B. Sanctions

We next turn to the district court's decision to impose Rule 11 sanctions. Rule 11 requires all parties who file a complaint in federal court, to make sure "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the complaint] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ." The rule allows a district court to impose an "appropriate sanction" when a party files a complaint in derogation of this responsibility. We review a court's decision to impose Rule 11 sanctions under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). "Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Harrington v. DeVito*, 656 F.2d 264, 269 (7th Cir. 1981).

Harris maintains that the district court abused its discretion in imposing sanctions because the complaint was well-grounded in a fact—the $8.00 overcharge—and was a good faith attempt to state a claim under RESPA. But Harris misconstrues the district court's decision. The district court never determined that Harris' basic theory of recovery was so far outside of the purview of RESPA that he should be sanctioned. Such a ruling might have

been improper; RESPA could reasonably be seen as having far-reaching scope. *See United States v. Gannon*, 684 F.2d 433, 438 (7th Cir. 1981) (*en banc*) ("Congress' aim [in enacting RESPA] was to stop *all* abusive practices that unreasonably inflate federally related settlement costs to the public."); *see also Mercado*, 763 F.2d at 271 ("RESPA is a broad statute"). The district court, rather, determined that even under Harris' extremely broad reading of RESPA, he made an unsupported damage claim on behalf of a class of plaintiffs that did not exist. *See* Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1335 at 92 (1990) ("Rule 11 may be applied to a single aspect of a document so that the sufficiency of some portions of a signed paper will not immunize it in its entirety."); *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063, 1067 (7th Cir. 1987). The district court concluded that these actions supported the imposition of sanctions under Rule 11. Our review is confined, simply, to whether the district court abused its discretion in reaching this conclusion.

First, regarding the excessive damage claim, even though Harris identified only an $8.00 overcharge, he nevertheless sued to recover all the charges Intercounty made to Durr: $62.00 for recording fees, $155.00 for closing fees, and $170.00 for title insurance. There was never an allegation that these fees were illegitimate. In fact, the documents attached to the complaint indicate that Intercounty actually provided these services. Harris does not dispute that these services were provided. The question, then, is why did Harris include these legitimate charges in his damage request? That is the question the district court asked in its *sua sponte* memorandum issued right after Harris filed his complaint. Harris had no answer, nor did he heed the obvious warning that was written between the lines of that memorandum—that he had made a frivolous damage claim. Instead, Harris proceeded to amend his complaint, asserting the same unsupported damage theory. *See Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1036 (7th Cir. 1988) (Rule 11 sanctions are appro-

priate where a party continues to pursue a claim after its frivolousness becomes clear). We will not say that the district court abused its discretion by imposing Rule 11 sanctions for Harris' excessive damage claim. One can wonder why Harris would literally "make a federal case" out of a paltry claim of $8.00. But at least there was some foundation for claiming that amount. To the extent the claim exceeded three times the $8.00, however, there was no basis for it. As we stated in *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), "[i]t is not acceptable to make an assertion of law and hope that it will turn out to be true."

Next, we turn to the district court's decision to impose sanctions because Harris sued on behalf of a class of plaintiffs that did not exist. Harris took the simple $8.00 overcharge and assumed that Intercounty had made similar overcharges in the past. Therefore, the complaint sought recovery on behalf of "all other persons who have been improperly overcharged for settlement services by the defendant . . . ." But Harris never identified any such injured persons. The district court reasonably concluded that Harris never made the appropriate inquiry—which is required by Rule 11—to determine whether Intercounty's overcharge to Durr was an isolated incident. *See Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 596 (7th Cir. 1989) (Rule 11 sanctions are appropriate where the undisputed evidence shows that an attorney filed a complaint without conducting the appropriate factual inquiry). Instead, in keeping with his attempt to turn a "petty dispute into a big ticket lawsuit," Harris imagined that the overcharge was not an isolated incident; that it was part of a larger scheme to bilk customers. The district court did not abuse its discretion by imposing sanctions for Harris' assertion that a class existed, when none really did. *Cf. Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985) (upholding Rule 11 sanctions where the plaintiff alleged that he was a member of victimized class under 42 U.S.C. § 1985(3), based on the sole fact that his car had been towed).

C. Other Arguments

Harris raises some other arguments that require little comment. First, Harris continues to take offense at Intercounty's Rule 11 memorandum, which made negative personal comments about him, at one point calling him "a legal gadfly." Harris contends that, not only should we reverse the Rule 11 sanctions against him, but that we should impose sanctions against Intercounty for making these accusations. We note that he never moved for sanctions at the district court. Nevertheless, the district court did not err in failing to award sanctions. The district court acted reasonably in striking the statements because they were unnecessary to the Rule 11 inquiry. Once stricken, the offending statements could offend no more. The only reason we recount the statements is because Harris has brought them up.

Next, Harris challenges the district court's purported imposition of sanctions under 28 U.S.C. § 1927. Harris claims that the court failed to provide adequate notice before imposing such sanctions. But, after careful review of the record, we are unable to see where the court awarded sanctions under 28 U.S.C. § 1927; the court made a passing reference to the statute at one point during a Rule 11 hearing, and that was it. The court made clear that it was imposing sanctions under Rule 11. Therefore, we make no further inquiry into Harris' contentions regarding 28 U.S.C. § 1927.

We note, as a final matter, that Harris does not challenge the amount or scope of the sanctions, thus eliminating any reason for us to evaluate them.

III. Conclusion

Harris made a federal case out of an $8.00 overcharge for title and mortgage recording services, alleging violations of RESPA. The district court properly dismissed the complaint. The district court also did not abuse its discretion in imposing Rule 11 sanctions against Harris for his

excessive damage claim, and for his unsupported allegation that there was a class of injured plaintiffs deserving of recovery. For the reasons expressed in this opinion, we

AFFIRM.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 16, 1994

Before
Hon. RICHARD A. POSNER, *Chief Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ROBERT A. GRANT, *District Judge**

Nos. 93-1570 & 93-2433

KEITH DURR,

Plaintiff-Appellant,

v.

INTERCOUNTY TITLE COMPANY OF ILLINOIS,
an Illinois corporation,

Defendant-Appellee.

Appeal of:
D. ALAN HARRIS,

Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 7340—**Milton I. Shadur**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Hon. Robert A. Grant, District Judge for the Northern District of Indiana, is sitting by designation.

Keith DURR, Plaintiff,
v.
INTERCOUNTY TITLE COMPANY OF ILLINOIS, Defendant.

No. 92 C 7340.

United States District Court,
N.D. Illinois, E.D.

Feb. 5, 1993.

Purchaser brought action against title company to recover for alleged splitting of charges by overcharging to record deed and mortgage. Title company filed motion to strike and motion to dismiss. The District Court, Shadur, Senior District Judge, held that overcharges did not violate statutory prohibition against giving and accepting any portion, split, or percentage of any charge made or received for rendering real estate settlement service.

Motions granted.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge.

Keith Durr ("Durr") has filed a putative class action against Intercounty Title Company of Illinois ("Intercounty") under a provision of the Real Estate Settlement Procedures Act ("RESPA"),[1] charging Intercounty with a violation of RESPA § 2607(b). Intercounty has responded with motions (1) to strike the prayer for relief advanced by Durr's counsel D. Alan Harris ("Harris") and (2) to

[1] RESPA comprises 12 U.S.C. §§ 2601-2617. All citations to its provisions in this opinion will simply take the form "RESPA § __," reflecting the section numbering in Title 12 rather than RESPA's internal numbering.

dismiss Durr's First Amended Class Action Complaint ("Complaint") and this action. For the reasons stated in this memorandum opinion and order, both of Intercounty's motions are granted.

Durr's Complaint, which must be accepted as accurate for present purposes, alleges that on August 21, 1992 Durr completed the purchase of some residential real property in conjunction with which Intercounty provided "settlement services" (a term defined by RESPA § 2602(3)). Durr asserts that among its charges for those services, Intercounty included amounts for the recording of the deed and mortgage that were in excess of the actual recording fees and costs for those documents. And according to Durr, that overcharge by Intercounty violated RESPA § 2607(b) (Complaint ¶¶ 6-8, 11-13):

> 6. In connection with the transaction, defendant charged Keith Durr $25.00 to record the Deed and $37.00 to record the Mortgage.
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> 7. In fact, the true recording cost for the Deed was $23.00, and defendant exacted an illegal, additional $2.00 payment for recording the Deed.
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> 8. In fact, the true recording cost for the Mortgage was $31.50, and the defendant exacted an illegal, additional $5 50 payment for recording the Mortgage.
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> * * * * * *
>
> 11. Plaintiff is informed and believes and on the basis of such information and belief alleges that defendant, in connection with its provision of "settlement services," engages in and at all times mentioned has engaged in the following practices: overcharging real estate sellers and buyers for settlement services, all in violation of The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. secs. 2061 et seq. ("RESPA").

> 11. [sic] By charging the plaintiff $25.00 rather than the actual $23.00 cost for recording of the Deed, defendant violated 12 U.S.C. sec. 2607(b) by accepting a charge for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.
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> 12. By charging the plaintiff $37.00 rather than the actual $31.50 cost for recording of the Mortgage, defendant violated 12 U.S.C. sec. 2607(b) by accepting a charge for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.
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> 13. This court has jurisdiction under 12 U.S.C. sec. 2614.

Although the Complaint ultimately fails for the reasons that will be explained later in this opinion, Intercounty's motion to strike will be addressed first. Here is how RESPA § 2602(3) refers to the concept of "settlement services" in an extensive but nonexhaustive (see *United States v. Graham Mortgage Co.*, 740 F.2d 414, 417 (6th Cir. 1984)) listing:

> the term "settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, and the handling of the processing, and closing or settlement[.]

And here is how RESPA § 20607(d)(2) unambiguously states the measure of damages for a violation of RESPA § 2607(b):

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

In this instance the "settlement service involved in the violation" was, as already stated, Intercounty's transmittal of Durr's deed and mortgage from its offices (where the real estate closing took place) to the office of the Cook County Recorder of Deeds. Intercounty's charge imposed for that service was $1.50 for the handling of each document. According to the Complaint's allegations, Intercounty also received an additional undisclosed amount because the recording charges actually imposed by the Recorder of Deeds were less than Intercounty had billed to Durr (an excess of $.50 for the deed and $2 for the mortgage).[2]

That, however, is not how Harris has framed the purported cause of action that he advances on Durr's behalf. Instead, from the very inception of the case—beginning with the initial Complaint filed November 5, 1992—Harris has flouted the statute's plain meaning by asking not for three times the $7.50 total overcharge but for three times the *entire* amount that was billed to Durr by Intercounty for *all* of its services and outlays—$62 for the recording of both documents ($54.50 of which actually went to the Recorder of Deeds), $155 as Intercounty's closing fee (as to which there is no contention made that the fee was

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[2] Intercounty's lawyer has explained the reason for the disparity in a manner summarized by this Court in its Opinion II, referred to a bit later in this opinion. On the current motions, however, it will be assumed that there was no legitimate basis for the overcharge—that it was inexcusable.

in any respect improper) and $170 as its title insurance premium (again an indisputably proper billing).

Promptly after this Court received the initial Complaint, it issued a November 13, 1992 sua sponte memorandum opinion and order ("Opinion I") that expressly called Harris' attention to the misguided and excessive claim that he had embodied in that pleading. On November 23 Harris amended that pleading by filing the Complaint, but he made no change at all in the respect referred to in the preceding paragraph. Instead he contemporaneously filed a nine-page "Response to Order of November 13, 1992" that talked all around that issue without ever suggesting a colorable (let alone a legitimate) basis for what he had done.

This Court followed with still another sua sponte memorandum opinion and order on December 1 ("Opinion II"), not only reiterating counsel's delinquency in that respect but also identifying some other problems with the claim as it then (and now) stood. As for the item now at issue, Opinion II at 264-65 said:

> When all the underbrush is cleared away, the arguments that Durr's counsel advances in the memorandum are entirely bogus in terms of both the RESPA statutory language *and* its purpose. *At most* the undisclosed settlement costs suffered by Durr would amount to $7.50, which trebled would come to $22.50.[3]

Yet Harris again did nothing to cure that patent defect. Little wonder, then, that Intercounty was compelled to resort to the filing of a motion to strike.

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[3] [Footnote by this Court] So that there can be no misunderstanding of the clarity of the message conveyed to Harris not once but twice (a message that this Court later repeated to him once again, this time orally at the January 6, 1993 status hearing in this case), copies of Opinions I and II are attached to this opinion.

And there is no doubt here as to just where the fault lies. Intercounty has taken Durr's deposition, and he has clearly testified that it was his understanding that the *only* overcharge was what he referred to as an $8 amount (clearly the same items, though he was $.50 off). To be sure, no lawyer (Harris included) is obligated to follow his or her client's understanding of legal matters. But Intercounty also took the deposition of attorney Jess Forrest ("Forrest," the lawyer who handled the real estate transaction and who is now co-counsel for Durr in this case—Forrest enlisted Harris when the idea of class action handling seemed to hold out the prospect for turning this petty dispute into a big-ticket lawsuit). And Forrest, obviously an experienced lawyer in real estate transactions, confirmed that the *only* overcharge was on the recording fees (what his Dep. 45 spoke of as "probably five, six dollars on the recording fees") and that "[e]very other fee that I have seen is customary in the industry" (Dep. 46). Forrest then went on (*id.*) to explain that last characterization based on his extensive experience with other title companies.[4] No, there is no question but that the dollar signs here were in Harris' eyes, and they obviously blinded him to the plain meaning of the law.

Accordingly the Complaint's prayer for relief must be stricken. And Harris' greed and obduracy must have their price. Unless Harris can offer up some better showing of the objective good faith that is demanded by Fed.R. Civ.P. ("Rule") 11 than he has done up to now, he will be subject to an "appropriate sanction" as mandated by

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[4] That characterization, apparent even from the few pages of his deposition submitted to this Court with Intercounty's motion to strike, is heavily underscored by the information in Intercounty's new filing referred to in the last paragraph of this opinion.

that rule. And unless Harris can indicate why, given his persistence in the face of this Court's repeated importunings, the appropriate sanction should not entail his making Intercounty whole for the attorneys' fees and expenses incurred in dealing with that issue, that will be the price he must pay for advancing and sticking to his legally frivolous claim.

As for the motion to dismiss, here is the statute (RESPA § 2607(b) invoked by Durr:

> **(b) Splitting charges**
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

Although a statutory heading is not part of the statute itself, the caption is consistent with the exceedingly plain meaning of the statute as one targeting only the *division* of charges where the giver is involved in rendering a "real estate settlement service" and the acceptor gets paid "other than for services actually performed."[5]

Here is how our Court of Appeals has confirmed the clear meaning and purpose of RESPA § 2607(b) in *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270-71 (7th Cir. 1985):

> We affirm because the complaint does not allege that Calumet gave or received "any portion, split, or

[5] Lawyers should be especially familiar with that kind of requirement. It echoes their own responsibilities, both under former Code of Professional Responsibility DR 2-107(A)(2) and under the current Rule of Professional Conduct 1.5(f) and (g).

> percentage of any charge" to a third party. Section 8 of RESPA is an anti-kickback statute. The statute requires at least two parties to share fees. As the Senate Report explained, § 8 "is intended to prohibit all kickback and referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed." S.Rep. 93-866, 93d Cong., 2d Sess. (1974), reprinted at 1974 U.S. Code Cong. & Admin. News 6551. The complaint does not allege the presence of any "other person."

Mercado, id. at 271 goes on to say:

> Congress considered and explicitly rejected a system of price control for fees; it concluded that the price of real estate services should be set in the market. See 1974 U.S. Code Cong. & Admin. News 6549-50. It directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets—the splitting and kicking back of fees to parties who did nothing in return for the portions they received.

Durr's attorney Harris points to the earlier decision in *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) (en banc)—though cited and meaningfully distinguished in *Mercado*—as leading to a different reading. It does not. *Gannon* treated a counter attendant at the Cook County Torrens section as a RESPA violator for having exacted payments for filing in an amount beyond what the state law authorized—a "gratuity" for doing the very job that the counter attendant was hired to do. But that was done on the legal fiction that Gannon was wearing two hats—the "official capacity" hat and his own as an individual—and was therefore both "giver" and "acceptor" when he pocketed the unauthorized amounts (684 F.2d at 438):

> We believe a single individual *can* violate § 2607(b) by receiving in his official capacity a "charge" for the rendering of settlement services, but personally keeping a portion of the charge in fact for something other than the performance of those services.

That sharp distinction between *Mercado* and *Gannon* has been well expressed in *Duggan v. Independent Mortgage Corp.*, 670 F.Supp. 652, 653-54 (E.D. Va. 1987).

Here the claimed misconduct of Intercounty simply does not come within the limited scope of RESPA § 2607(b). Durr's payment was made to Intercounty—clearly *they* were not the giver and acceptor who split a real estate settlement service charge. As for the other payment involved—from Intercounty to the Recorder of Deeds—it involves the exact opposite of the statutory prohibition, for there was no *acceptance* by the Recorder of a portion of the charges originally paid by Durr "other than for services actually performed." This case is as nonactionable under RESPA § 2607(b) as were *Mercado* and *Duggan*.

Durr's Complaint and this action are therefore dismissed for their failure properly to invoke the jurisdiction of this Court under RESPA § 2607(b). One further note needs to be added, however, as to post-dismissal matters. After this opinion had already been prepared for delivery to the parties at the previously-scheduled February 5, 1993 status hearing, this Court received Intercounty's motion for the imposition of sanctions under Rules 11 and 37. That motion asserts reasons over and above those that have been identified in this opinion as likely calling for Rule 11 sanctions related solely to Intercounty's motion to strike. Accordingly the parties shall file the following submissions in this Court's chambers on or before February 15, 1993:

1. Durr and its counsel (both Harris and Forrest) are ordered to file their responses dealing both with the matters covered in this opinion and with Intercounty's motion for sanctions.

2. Intercounty may (but is not required to) file a supplement to its motion for sanctions to the extent if any that it deems appropriate, but limited to the issue of potential sanctions arising out of the matter addressed by its motion to strike. Because it is not yet certain what the ultimate scope of any sanctions to be imposed may encompass, Intercounty shall not now tender any submission as to the amount of attorneys' fees and other expenses that it has incurred in connection with the motion to strike or its other motions.

APPENDIX

MEMORANDUM OPINION AND ORDER

[Dated November 13, 1992]

Keith Durr ("Durr") has filed a proposed class action against Intercounty Title Company of Illinois ("Intercounty"), charging Intercounty with a violation of the Real Estate Settlement Procedures Act of 1974 ("RESPA," 12 U.S.C. §§ 2601-2617[1]) in connection with the closing of Durr's purchase of a residence in August of this year.

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[1] All statutory citations in this opinion will take the form "RESPA § __," citing to the section numbering within Title 12 rather than to RESPA's internal section numbering.

Based on its initial review of Durr's Complaint,[2] this Court sua sponte directs Durr's counsel to speak to the issues that are identified here.

According to Complaint ¶¶ 6-8 and 11-12, Intercounty overcharged Durr at the real estate closing by including in the closing statement a $25 figure (rather than the actual cost of $23) for recording the warranty deed running from Durr's sellers to Durr and $37 (rather than the actual cost of $31) for recording Durr's mortgage in favor of his lender, Greenwich Capital Financial, Inc. Despite the modest amount involved (all of $8 in excess out-of-pocket expense[3]), Durr's lawyers "have made a federal case out of it"[4] by claiming not only treble damages for Durr but also treble damages for the putative class of which Durr is a member.

At the outset some points ought to be made about Durr's own claim. Even if Durr's allegations are to be

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[2] This Court always undertakes an immediate review of newly-filed complaints; see *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986):

> The first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged.

Even if that threshold review discloses no problems of subject matter jurisdiction as such (and Durr's Complaint does not), a court need not blind itself to other problematic aspects of the litigation as disclosed by the pleadings.

[3] That represents the maximum that could be involved—for example, it does not appear whether part or all of the differential represents mailing costs or other legitimate out-of-pocket expenditures.

[4] This quotation of the colloquial expression may be a bit unkind. Congress itself has "made a federal case" out of RESPA violations by providing for treble damages under RESPA § 2607(d)(2) and by conferring district court jurisdiction over such actions under RESPA § 2614.

accepted (as this Court is bound to do in evaluating his Complaint), Durr's damages for the violation would appear to be three times the $8 overcharge or $24, rather than three times what Intercounty charged for *all* its settlement services as prayed for in Durr's Complaint (Durr was charged $62 for the recording fees referred to earlier, plus $155 for closing fees (which he does not challenge as a RESPA violation), and plus $170 for title insurance (also an unchallenged item)). And as for any additional relief beyond properly calculated treble damages, RESPA § 2607(d)(5) permits the court to award to a prevailing private-party plaintiff "reasonable attorneys' fees"—but Durr and his lawyer must be aware that if any such plaintiff has simply jumped in to file suit without having given the opponent notice of the claim and an opportunity to cure any violation, that factor would necessarily be taken into account in determining the reasonableness of any fees sought to be collected.[5]

So much then for Durr's own apparently overblown individual claim. As for any effort to springboard that individual claim into a class action (something that this Court is obligated to address early under Rule 23(c)(1)), there is nothing to suggest that the complained-of overcharge is part of a regular pattern of activity engaged in by Intercounty. Instead Complaint ¶ 3 simply refers to "all other persons who have been improperly overcharged for

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[5] There is of course an analogy in Fed.R.Civ.P. 11 litigation, where our Court of Appeals has taught that fee shifting is inappropriate unless a like opportunity to cure the violation as a matter of mitigation has been afforded to the offending party (see, e.g., *Dubisky v. Owens*, 849 F.2d 1034, 1038-39 (7th Cir. 1988)). Indeed, that kind of curative opportunity is part of the proposed amendments to Rule 11 now pending for consideration by the Supreme Court.

settlement services by the defendant in connection with transactions involving a 'federally related mortgage loan.' " Durr's lawyers have proffered nothing to indicate that such a conclusory allegation—something that if sought to be introduced in the course of litigation would be subject to being stricken as "assuming facts not in evidence"—is the product of the prefiling inquiry that counsel are mandated to undertake by Rule 11.

Accordingly Durr's counsel are ordered to file in this Court's chambers on or before November 23, 1992 a statement as to (1) the predicate for their seeking as Durr's damages any amount in excess of $24 (that is, three times the $8 overcharge alleged in the Complaint) and (2) the nature of their prefiling inquiry as to, and the nature of the factual underpinning for, the existence of other similarly overcharged persons who would make up the putative class referred to in Complaint ¶ 3. Durr's counsel are also directed to transmit a copy of this memorandum order to Intercounty at the same address that they have designated for the service of process on it. This action is set for an initial status hearing at 8:45 a.m. November 30, 1992.

/s/ MILTON I. SHADUR
Milton I. Shadur
Senior United States District Judge

MEMORANDUM OPINION AND ORDER

[Dated December 1, 1992]

This Court's November 13, 1992 memorandum opinion and order (the "Opinion") directed counsel for plaintiff Keith Durr ("Durr") to respond to issues posed by Durr's proposed class action complaint, obvious to this Court even on a threshold review. In response Durr's counsel has filed both (1) a nine-page memorandum (with attached exhibits) and (2) a First Amended Class Action Complaint (the "Amended Complaint").[1]

One minor change has been made in the Amended Complaint in describing the asserted RESPA violation committed by Intercounty Title Company of Illinois ("Intercounty") in the transaction in which Durr bought his residence: Instead of a purported $8 overcharge, Durr claims that he was overcharged $7.50 in the "recording costs" for the deed and mortgage listed in Intercounty's closing statement. But Durr's counsel somehow persists in the claim that the recoverable treble damages under RESPA are to be measured by three times Intercounty's *total* settlement services, even though the $155 that it charged for closing fees and the $170 that it charged for title insurance was unquestionably disclosed to and are unchallenged by Durr.

In that respect the memorandum seeks to justify Durr's excessive claim by cloaking it in the knightly mantle of consumer protection. Of course this Court has no more desire to countenance any illegal or over-reaching title in-

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[1] Fed.R.Civ.P. ("Rule") 15(a) gives a plaintiff the absolute right to file an amended complaint where, as here, no responsive pleading has yet been filed.

surer practices than Congress did in enacting RESPA. But this Court also sees no *public* benefit in converting RESPA into some type of Attorneys' Relief Act where the public weal is really not being served at all—or if it is, is being served minimally at best. When all the underbrush is cleared away, the arguments that Durr's counsel advances in the memorandum are entirely bogus in terms of both the RESPA statutory language *and* its purpose. *At most* the undisclosed settlement costs suffered by Durr would amount to $7.50, which trebled would come to $22.50.

But even that small amount appears substantially overstated. Simultaneously with its receipt of Durr's new filings, this Court also received a letter and accompanying exhibits from Intercounty's general counsel (a copy of course having been sent to Durr's lawyer). That letter disclosed the courteous handling of the matter by Durr's counsel once this suit had been filed—both by giving Intercounty additional time to retain counsel in the case and by forwarding a courtesy copy of the Opinion to Intercounty's lawyer. But the letter also disclosed facts that bear on this Court's proper treatment of the matter (including a confirmation of the Opinion's surmise that the suit had been launched without any *prior* effort by Durr's counsel to obtain RESPA relief for the client—assuming, that is, that Durr was entitled to relief).

In substantive terms, it appears that $.50 of the recording charge for the deed was based on the normal charge that is uniformly made *by the Recorder of Deeds* for mailing any document—a charge that was inapplicable to Durr only because his lawyer had a rented lockbox at the Re-

corder's Office.[2] As for the mortgage, $4 of the amount that Intercounty's closing officer improperly charged for its recording was attributable to the fact that Durr's lender employed 8-½″ × 14″ paper rather than the 8-½″ × 11″ paper that is now used in the vast majority of residual mortgages (Intercounty tells its lawyer that the latter applies to 90% to 95% of current mortgages[3]), so that two fewer pages than the norm had to be recorded at the Recorder's fee of $2 per page.

Those two items account for all except the $1.50 per document charge that Intercounty made, as to which its preclosing statement to Durr stated:

> We have included a one dollar and fifty cent service and handling fee in the charges for any instruments recorded.

In sum, the situation is one in which (a) $.50 of the complained-of damage to Durr is apparently limited to a *very* small number of people at most, (b) another $4 of the claimed damage resulted from the combination of an advanced billing for the mortgage recording, based on the closing officer's mistaken assumption about the documents

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[2] On that score Intercounty's lawyer says:

> To find an attorney who has such a lockbox is (I'm advised) quite a rare event. I'm further advised that same probably doesn't occur in (at best) more than 1 out of every 500 transactions.

This Court is not of course in a position to evaluate that assertion in factual terms, but if true it would bear significantly on the appropriateness of class treatment of that particular component of any RESPA claim.

[3] Again (as with the item referred to in n. 2) this Court makes no finding in that respect, but the same comment that has been made in the last sentence of n. 2 applies here as well.

that he or she then failed to catch at the closing (once again something that seems to apply to a very small minority of transactions), and (c) the remaining $3 that was charged as Intercounty's "service and handling fee" appears likely to have been disclosed in compliance with RESPA.

It was a famous vaudeville routine—indeed, one involving a lawyer and his client—whose tag line was "pay the two dollars."[4] There is no question that the simple device of a telephone call by Durr's counsel would swiftly have resolved Durr's own legitimate claim without the need for bringing any legal action at all. If what has been set out here bears on the viability of any class action to begin with,[5] a serious cloud would seem to be cast on the adequacy of representation issue that enters importantly into the Rule 23 decision as to class certification.[6]

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[4] Although this Court is uncertain as to the original author-players in the two-man skit, its movie version—part of a 1930s film about Florenz Ziegfeld and his "Follies"—featured the late great comic Victor Moore as the client and the noted character actor (better known for serious roles than for comedy) Edward Arnold as the lawyer.

[5] Moreover, where such extremely small potential claims are involved, the costs of ascertaining the existence or nonexistence of a class and of identifying and communicating with putative class members create a real dilemma. On the one hand a law violator should not of course be rewarded by being allowed to retain any illegally-obtained charges—but on the other hand, as suggested earlier, such statutes as RESPA are aimed at benefiting the consuming public and not just the lawyers who are handling the case.

[6] Durr's lead lawyer refers at Mem. 9 n. 3 to his prior experience in class actions. But the arguments that he has advanced to date do not instill much confidence, and it cannot be gainsaid that any classwide cause of action that might be recognized here would go a long way down the road urged by Professors Jonathan Macey and Geoffrey Miller in *The Plaintiffs' Attorney's Role in Class*

(Footnote continued on following page)

At this reading this Court remains prepared to address its Rule 23 task in an appropriate fashion. But Durr and his counsel must recognize the hurdles they have to confront, with the related inquiry whether the game is worth the candle. Counsel for both sides should come prepared to discuss the issues at the previously-set December 2 status hearing.

/s/ MILTON I. SHADUR
Milton I. Shadur
Senior United States District Judge

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[6] *continued*
Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U.Chi.L.Rev. 1 (1991)—in which the class action client is done away with as a needless fiction, in favor of recognizing the lawyer as the real party in interest. But the thesis of Professors Macey and Miller does not reach quite so far as to embrace actions in which almost no benefit goes to any individual class member, while only the class counsel is very richly rewarded.

[Dated March 18, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEITH DURR,	)	
	)	
Plaintiff,	)	
v.	)	No. 92 C 7340
	)	
INTERCOUNTY TITLE COMPANY OF ILLINOIS,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Intercounty Title Company of Illinois ("Intercounty") has moved for sanctions in this action—an action that was ill-conceived from the outset. In addition to the lawsuit's having been fueled by the "greed and obduracy of plaintiff's counsel" (as this Court said at page 6 of its February 5, 1993 memorandum opinion and order), Intercounty's current submissions in support of its motion have disclosed that counsel for plaintiff Keith Durr ("Durr") filed a false General Rule 39 affidavit, as well as reflecting some questionable activity on the part of Jess Forrest as Durr's original counsel. It must be concluded that quite apart from the ultimate basis for dismissal of this action based on the inapplicability of the statute (RESPA §2607(b)) to Intercounty's conduct, a subject covered at pages 7 through 9 of the February 5 opinion, the entire course of the litigation was driven by the insupportable insistence of Durr's counsel on damages in an amount that had no relationship at all to the alleged violation by Intercounty. In sum, this is a lawsuit that should never have been brought—

given the objective good faith requirement of Fed. R. Civ. P. ("Rule") 11.[1]

Rule 11 calls for the imposition of an "appropriate sanction" in response to every violation of its terms. That may or may not call for fee-shifting, a subject dealt with in numerous cases and in the proposed revision of the Rule. In this instance, however, it was an egregious violation to embroil Intercounty in this litigation—one in which Durr could have obtained complete relief (even though RESPA was not in fact implicated) by the simple device of a telephone call. Intercounty is entitled to recover its fees and out-of-pocket expenses under Rule 11. Counsel should confer on that score, both as to the time and as to the hourly rates, in the interest of reaching an agreement on the appropriate lodestar figure (or absent total agreement, to minimize any areas of controversy). This matter is set for a status hearing at 9 a.m. April 2, 1993.

/s/ MILTON I. SHADUR
Milton I. Shadur
Senior United States District Judge

Date: March 18, 1993

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[1] This Court rejects the contention that the Complaint reflected "a plausible view of the law" (Durr's Mem. 10-11). Where the statutory provision is as plain as this one, the absence of precedent most likely reflects the fact that no one has ever seen fit to advance the argument presented by counsel here, rather than the argument's being supportable on a good faith basis. Nor is that conclusion affected, as Durr's Mem. 5 suggests, by the fact that "this court did not find a lack of jurisdiction upon its initial review of the Complaint." District court judges cannot be expected to do counsel's work for them, reviewing and researching the substantive underpinnings of every new lawsuit.